NO 81 5944

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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SUPREME COURT U.S.

CHARLES DWIGHT MESSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

PAGE(S)

QUESTION I

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE COURT IMPROPERLY APPROVED THE PRESENTATION OF TESTIMONY OF THE PROSECUTOR AS TO THE REASONS UNDERLYING HIS EXERCISE OF PROSECUTORIAL DISCRETION, WHICH TESTIMONY SIGNIFICANTLY UNDERMINED THE RELIABILITY OF THE FACT-FINDING PROCESS AND ADDITIONALLY, DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL ON THE PENALTY ISSUE. 4

QUESTION II

WHETHER THE SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE AN ILLEGAL AGGRAVATING CIRCUMSTANCE CONTRIBUTED TO THE DECISION TO IMPOSE THE PENALTY OF DEATH. 12

QUESTION III

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE COURT FAILED TO DETERMINE WHETHER EX PARTE INFORMATION RELATING TO PETITIONER OR OTHER DEATH-SENTENCED DEFENDANTS HAD BEEN RECEIVED AND REVIEWED BY THE COURT DURING ITS APPELLATE REVIEW PROCESS. 16

TABLE OF CONTENTS

	PAGE(S)
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
CITATION TO OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW	2
REASONS FOR GRANTING WRIT	
QUESTION I WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE COURT IMPROPERLY APPROVED THE PRESENTATION OF TESTIMONY OF THE PROSECUTOR AS TO THE REASONS UNDERLYING HIS EXERCISE OF PROSECUTORIAL DISCRETION, WHICH TESTIMONY SIGNIFICANTLY UNDERMINED THE RELIABILITY OF THE FACT-FINDING PROCESS AND ADDITIONALLY, DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL ON THE PENALTY ISSUE.	4
QUESTION II WHETHER THE SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE AN ILLEGAL AGGRAVATING CIRCUMSTANCE CONTRIBUTED TO THE DECISION TO IMPOSE THE PENALTY OF DEATH.	12
QUESTION III WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE COURT FAILED TO DETERMINE WHETHER EX PARTE INFORMATION RELATING TO PETITIONER OR OTHER DEATH-SENTENCED DEFENDANTS HAD BEEN RECEIVED AND REVIEWED BY THE COURT DURING ITS APPELLATE REVIEW PROCESS.	16
CONCLUSION	20
CERTIFICATE OF SERVICE	21

TABLE OF CITATIONS

CASES	PAGE(S)
Alim v. Smith, 474 F.Supp. 54 (W.D.N.Y. 1979)	10
Anders v. California, 386 U.S. 738 (1967)	17
Bachellar v. Maryland, 397 U.S. 564 (1970)	13
Berger v. United States, 295 U.S. 78 (1935)	9,10
Brown v. Estelle, 468 F.Supp. 42 (N.D. Tex 1978), aff'd. 591 F.2d 1207 (5th Cir. 1979)	10
Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied 50 U.S.L.W. 3349 (U.S. Nov. 2, 1981)	14,16,17
Bufford v. State, 382 So.2d 1162 (Ala.Crim.App. 1980), cert. denied 382 So.2d 1175 (Ala. 1980)	15
Bullington v. Missouri, ___U.S.___, 68 L.Ed.2d 270, 101 S.Ct. 1852 (1981)	14
Chambers v. Mississippi, 410 U.S. 284 (1973)	8
Davis v. Alaska, 415 U.S. 308 (1974)	8
Demps v. State, 395 So.2d 501 (Fla. 1981), cert. denied 50 U.S.L.W. 3279 (U.S. Oct. 13, 1981)	14
Devine v. United States, 403 F.2d 93 (10th Cir. 1968), cert. denied, 394 U.S. 1003 (1969)	9
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	10
Estelle v. Smith, ___U.S.___ (68 L.Ed.2d 359(1981))	18
Gardner v. Florida, 430 U.S. 349 (1977)	6,8,16,17,18
Green v. State, 272 S.E.2d 475 (Ga. 1980), cert. denied 450 U.S. 936 (1981)	15
Gregg v. Georgia, 428 U.S. 153 (1976)	5,6
Hall v. United States, 419 F.2d 582 (5th Cir. 1969)	9
Houston v. Estelle, 569 F.2d 372 5th Cir. 1978)	10
Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975)	9,10
Lockett v. Ohio, 438 U.S. 586 (1978)	6,14
Messer v. State, 330 So.2d 137 (Fla. 1976)	1,4
Messer v. State, opinion dated April 26, 1979	2
Messer v. State, 384 So.2d 644 (Fla. 1980)	2
Messer v. State, 403 So.2d 341 (Fla. 1981)	1
Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978)	10
Mostade v. Engle, 507 F.Supp. 402 (N.D. Ohio 1980)	10
Ohio v. Roberts, 448 U.S. 56 (1980)	8,18
Presnell v. Georgia, 439 U.S. 14 (1978)	6
Proffitt v. Florida, 428 U.S. 242 (1976)	17,19

CASES, contd.	PAGE(S)
Sandstrom v. Montana, 442 U.S. 510 (1979)	13
Songer v. State, 322 So.2d 481 (Fla. 1975), vacated on other grounds 430 U.S. 952 (1977)	17
State v. Cherry, 257 S.E.2d 551 (N.C. 1979), cert. denied 446 U.S. 941 (1980)	15
State v. Dixon, 283 So.2d 1 (Fla. 1973)	14
State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981), cert. denied, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981)	7
State v. Monroe, 397 So.2d 1258 (La. 1981)	15
State v. Moore, 614 S.W. 2d 348 (Tenn. 1981)	15
State v. Peery, 261 N.W.2d 95 (Neb. 1977), cert. denied 439 U.S. 882 (1978)	15
State v. Steelman, 612 P.2d 475 (Ariz. 1980), cert. denied 449 U.S. 913 (1980)	15
Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified 648 F.2d 446 (5th Cir. 1981), cert. granted 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981)	12,13
Street v. New York, 394 U.S. 576 (1969)	13
Stromberg v. California, 283 U.S. 359 (1931)	13
Tedder v. State, 322 So.2d 908 (Fla. 1975)	13,14
United States v. Benson, 487 F.2d 978 (3rd Cir. 1973)	9
United States v. Gonzalez Vargas, 558 F.2d 631 (1st Cir. 1977)	9
United States v. Leon, 534 F.2d 667 (6th Cir. 1976)	9
United States v. Splain, 545 F.2d 1131 (8th Cir. 1976)	9
Vasil v. State, 374 So.2d 465 (Fla. 1979)	17
Woodson v. North Carolina, 428 U.S. 280 (1976)	6,18
Yates v. United States, 354 U.S. 298 (1957)	13

CONSTITUTION

United States Constitution	
Fifth Amendment	1,3,16,18
Sixth Amendment	1,3,16,17,18
Eighth Amendment	1,3,4,12,15, 16,18
Fourteenth Amendment	1,3,4,8,12,15, 16,17

STATUTES	PAGE(S)
28 U.S.C. §1257	1
Section 921.141, Florida Statutes (1973)	1,7,12

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is Messer v. State, 403 So.2d 341 (Fla. 1981), and is set forth in Appendix A. The motion for rehearing and the denial thereof are set forth in Appendix B.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered June 4, 1981, and petitioner's timely motion for rehearing was denied on October 1, 1981 (Appendix B).

On November 13, 1981, Associate Justice Lewis F. Powell, Jr., granted the motion of petitioner to extend the time for filing this petition until December 30, 1981 (Appendix C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix D. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was tried by jury, convicted of murder in the first degree and robbery, and was sentenced to death. In Messer v. State, 330 So.2d 137 (Fla. 1976), the death sentence was vacated and the cause remanded for another sentencing hearing because the trial judge refused to allow the sentencing jury to know that petitioner's accomplice, Ronald Brown, negotiated a plea of guilty to second degree murder and was sentenced to thirty years imprisonment. (Appendix E).

After the second sentencing proceeding, a sentence of death was again imposed (Appendix F). During this sentencing proceeding, State Attorney Curtis Golden testified, over objection, as to why he plea-bargained with Ronald Brown, but

not with petitioner (Appendix G).

On appeal to the Supreme Court of Florida, petitioner argued, inter alia, that the trial court erred in allowing the State Attorney to testify as to why petitioner was tried for first degree murder and Brown was not, and that the trial court erred in sentencing petitioner to death because the court improperly evaluated the existing aggravating and mitigating circumstances.

The Supreme Court of Florida issued an opinion April 26, 1979, affirming petitioner's death sentence (Appendix H). In response to petitioner's motion for rehearing (Appendix I), the Supreme Court of Florida withdrew its opinion. Messer v. State, 384 So.2d 644 (Fla. 1980) (Appendix J).

June 4, 1981, the Supreme Court of Florida issued its opinion affirming petitioner's death sentence. The Court found no error in allowing the State Attorney to testify as to the disparate treatment of petitioner and Brown. Although the Court found that the trial judge had improperly considered certain aggravating circumstances, it found the error harmless (Appendix A).

Petitioner timely moved for rehearing. In both motions for rehearing, petitioner alleged that the Supreme Court of Florida had, without notice to petitioner, requested the Department of Offender Rehabilitation to send to the Court a copy of the latest psychological report pertaining to petitioner. Petitioner requested a hearing to determine whether such a report was received and considered by the Court (Appendix B and I).

The petition for rehearing was denied October 1, 1981 (Appendix B-7).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner argued in the trial court and on appeal that allowing the State Attorney to testify was improper rendering

his death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Petitioner argued in the appellate court that affirmance by the Court of the death sentence where the trial court had relied upon improper considerations in sentencing was contrary to the Eighth and Fourteenth Amendments. Petitioner also asserted before the appellate court that its receipt of secret psychological reports pertaining to death-sentenced defendants would render his death sentence unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments.

REASONS FOR GRANTING WRIT

QUESTIONS PRESENTED

QUESTION I

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE COURT IMPROPERLY APPROVED THE PRESENTATION OF TESTIMONY OF THE PROSECUTOR AS TO THE REASONS UNDERLYING HIS EXERCISE OF PROSECUTORIAL DISCRETION, WHICH TESTIMONY SIGNIFICANTLY UNDERMINED THE RELIABILITY OF THE FACT-FINDING PROCESS AND ADDITIONALLY, DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL ON THE PENALTY ISSUE.

The Supreme Court of Florida held in petitioner's initial appeal that he should have been allowed during the sentencing portion of the trial to present to the jury the fact that his accomplice, Ronald Brown, negotiated a plea of guilty to the offense of second degree murder and was sentenced to a term of imprisonment of 30 years. Messer v. State, 330 So.2d 137 (Fla. 1976) (Appendix-E). At the second sentencing proceeding, over petitioner's objection, Curtis Golden, State Attorney for the First Judicial Circuit of Florida, was allowed to testify as to the reasons underlying his acceptance of Brown's plea to second degree murder and as to the reasons underlying his refusal to plea bargain with petitioner. In explaining the manner in which he exercised his prosecutorial discretion, Golden testified to facts that were based on hearsay, i.e.: Brown had no previous criminal record; to opinions that were not based upon personal knowledge or upon facts or circumstances which were established by legal evidence presented to the jury, i.e.: petitioner was the leader and Brown was the follower in the criminal episode and petitioner dominated Brown during the criminal episode; and to circumstances that were not relevant to the statutorily enumerated aggravating circumstances, i.e.: Brown was remorseful and petitioner was not. Engaging in rank speculation, Golden rationalized his plea bargain with petitioner's accomplice as follows:

> ...I felt that these mitigating circumstances outweighed or neutralized the aggravating circumstances in the case. And, under the law, if a person is convicted of first degree murder and the jury recommends mercy, and the judge accepts that, then the penalty is life imprisonment. Under the law the maximum penalty for second degree murder is life imprisonment. So I felt that rather than to -- I felt that the mitigating circumstances neutralized the aggravating circumstances in his particular instance. And, I felt for that reason that the jury in all probability would recommend mercy, and the judge would probably grant that....
>
> (Appendix G-8).

Then, exceeding all bounds of propriety, Golden testified that he refused to plea bargain with petitioner and instead prosecuted him for first degree murder because "there were four aggravating circumstances detailed by the statute present" and he "found no mitigating circumstances". (Appendix G-10-11).

The Supreme Court of Florida upheld the admission of this testimony reasoning that it was within the discretion of the trial court to allow the state to explain to the jury, through the testimony of the State Attorney, the reasons for the seemingly disparate treatment of Brown and petitioner (Appendix-A). By so ruling, the Court upheld a sentencing procedure which clearly violates the Eighth and Fourteenth Amendments.

A. THE TESTIMONY PRESENTED UNDERMINES THE RELIABILITY OF THE FACT-FINDING PROCESS WHICH IS CONSTITUTIONALLY NECESSARY TO JUSTIFY IMPOSITION OF THE DEATH PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has recognized that the penalty of death is different in kind from any other punishment. Because of the uniqueness of the death penalty, this Court has indicated that the death penalty cannot be imposed under sentencing procedures which create a substantial risk that it will be inflicted in an arbitrary or capricious manner. Gregg v. Georgia, 428 U.S. 153, 188 (1976). It has been repeatedly emphasized that because of the qualitative difference between the penalty of

death and that of life imprisonment, there is a correspondingly greater need for accurate and reliable sentencing information in the determination that death is the appropriate punishment in a specific case. Gregg, 428 U.S. at 190; Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Lockett v. Ohio, 438 U.S. 586 (1978). "[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." Gregg, 428 U.S. at 190. Further, it is clear that the fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial. Presnell v. Georgia, 439 U.S. 14, 15 (1978). Additionally, as noted in Gardner, imposition of a death sentence based upon confidential information which the defendant has no opportunity to deny or explain violates due process.

The decision of the Supreme Court of Florida violates the principles of the foregoing cases because the testimony of the State Attorney, which consisted of opinions and hearsay, was unreliable, irrelevant, not subject to verification, and of such a character that it could not be subjected to meaningful cross-examination. This testimony cannot be characterized as the "accurate and reliable sentencing information" which is constitutionally necessary to make the reasoned determination that death, rather than life imprisonment, is the appropriate punishment.

The issues before the jury at the presentence hearing were whether sufficient statutorily enumerated aggravated circumstances existed, and if so, whether sufficient mitigating circumstances were shown that would outweigh those aggravating circumstances. The testimony of the State Attorney concerning the justifications for and reasons underlying his decision to

plea-bargain with petitioner's accomplice and his refusal to plea bargain with petitioner had absolutely no relevance to the issues before the jury at the presentence hearing. Cf. State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981), cert. denied, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981), where the court held that testimony relating to the district attorney's refusal to engage in plea bargaining with defendants and to the district attorney's policies concerning his handling of similar cases was properly excluded, although offered by the defense in mitigation at the sentencing hearing, because this testimony presented no issue for jury consideration. The deliberative processes of the State Attorney in determining whether to engage in plea bargaining with a capital defendant has not been deemed by the Florida legislature to be a proper predicate upon which to base the sentencing determination. § 921.141(1). To allow the prosecutor's opinion that the death penalty is totally justified to be presented to the jury creates the risk that the death penalty will be imposed in an arbitrary and capricious manner based upon the prosecutor's political decision rather than a reasoned evaluation by the jury of the aggravating circumstances and relevant aspects of the offense and the defendant's character.

The testimony of the State Attorney presented here deprived petitioner of his right to due process. The State Attorney's testimony that there were four aggravating circumstances detailed by the statute and no mitigating circumstances clearly suggested to the jury that they could forego their duty to determine the aggravating and mitigating circumstances because the State Attorney had already done it for them. The prejudicial effect of such testimony is unquestionable. Most critically, there was no substantial reason to assume that the State Attorney's assessment of the aggravating and mitigating circumstances was accurate or reliable. Similarly, there was no basis upon which to assume the accuracy or reliability of the State Attorney's opinion that

petitioner was the leader and dominated Brown in the criminal episode. Since the State Attorney's opinion in this regard was not based upon personal knowledge, but rather on unknown hearsay information, petitioner had no opportunity to deny or rebut this information.

As a whole, the State Attorney's testimony informed the jury that the disparate treatment of petitioner and Brown was justified. Rather than present facts concerning Brown's character and his involvement in the offense from which the jury could make their own determination concerning this issue, the state sought to establish the justification for the disparate treatment through the testimony of the State Attorney that in his opinion the disparate treatment was justified and that his decision exercising his prosecutorial discretion was correct. Such testimony can hardly be characterized as accurate or reliable. The time-honored means by which the truth and accuracy of testimony are tested is cross-examination. Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973). See also, Ohio v. Roberts, 448 U.S. 56 (1980). However, there is no way by which the prosecutor's decision-making process can be subjected to meaningful cross-examination.

Contrary to this Court's admonitions in Gardner, the Florida Supreme Court here has failed to give due consideration to the quality of the information upon which the sentencing decision in a capital case should be based.

B. THE TESTIMONY PRESENTED DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Supreme Court of Florida's affirmance of petitioner's death sentence violated his fundamental due process right to a fair trial on the penalty issue by approving the testimony of the State Attorney which would clearly constitute prejudicial constitutional error if presented as prosecutorial argument. As previously noted, the testimony presented consisted of the

State Attorney's personal opinion or belief as to the ultimate issue to be decided by the jury - whether aggravating circumstances existed, and if so, whether sufficient mitigating circumstances existed which outweighed the aggravating circumstances so as to justify the punishment of life imprisonment rather than death. The jury was informed that the State Attorney believed there were four aggravating circumstances and no mitigating circumstances. The testimony also conveyed to the jury that the death penalty would not have been sought against petitioner unless the State Attorney and his office, based upon their weighing of the aggravating and mitigating circumstances, were convinced that the death penalty was justified. The prejudicial effect here is even more egregious than if the same belief had been conveyed by prosecutorial argument since the State Attorney's belief was improperly presented by sworn testimony which clothed it with the aura of reliability.

Assertions by a prosecutor, based upon personal knowledge, expressing his personal opinion concerning the guilt of the accused have been repeatedly condemned. E.g. Berger v. United States, 295 U.S. 78 (1935); United States v. Gonzalez Vargas, 558 F.2d 631 (1st Cir. 1977); United States v. Benson, 487 F.2d 978 (3rd Cir. 1973); Hall v. United States, 419 F.2d 582 (5th Cir. 1969); United States v. Leon, 534 F.2d 667 (6th Cir. 1976); United States v. Splain, 545 F.2d 1131 (8th Cir. 1976); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975); Devine v. United States, 403 F.2d 93 (10th Cir. 1968), cert. denied, 394 U.S. 1003 (1969). This Court has recognized that since the prosecuting attorney has the obligation in criminal prosecutions not to win a case but rather to ensure that justice is done:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper

> suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. at 88. A prosecutor's expression of personal opinion concerning the guilt of the accused is particularly pernicious since it presumes that the entire governmental establishment has reached a determination of the defendant's guilt before the trial and improperly implies that this determination is either binding upon the jury or should be highly persuasive to it. Egregious prosecutorial argument constitutes a denial of due process rendering the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Kelly v. Stone, supra; Mostade v. Engle, 507 F.Supp. 402 (N.D. Ohio 1980); Alim v. Smith, 474 F.Supp. 54 (W.D. N.Y. 1979); Brown v. Estelle, 468 F.Supp. 42 (N.D. Tex. 1978), aff'd, 591 F.2d 1207 (5th Cir. 1979).

The testimony presented here clearly violates the principles of the foregoing cases. The testimony, unambiguously and deliberately, informed the jury that the State Attorney believed the death penalty was justified because the State Attorney had determined that there were four aggravating and no mitigating circumstances. Petitioner repeatedly objected to the testimony, and the jury was not instructed that the testimony of the State Attorney expressing his personal opinions and beliefs was entitled to no weight in their deliberations. By approving such testimony, the Florida Supreme Court has totally ignored the clear impropriety of the prosecutor's prejudicial testimony presented here and has deprived petitioner of his fundamental right to a fair trial on the issue of punishment.

This Court should grant certiorari to determine the type of evidence which may be offered by the state in aggravation at a capital presentence hearing. The testimony presented

here far exceeds that which should be allowed and does not constitute the accurate and reliable sentencing information which this Court has repeatedly held to be necessary in order to determine that death is the appropriate punishment. The decision of the Florida Supreme Court totally ignores the impropriety and prejudicial effect of testimony from the State Attorney that in his opinion the death penalty was justified because he had determined that the aggravating circumstances outweighed the mitigating circumstances, which testimony deprived petitioner of a fair trial on the issue of punishment.

The issue presented here, although one seemingly of first impression, is of utmost importance because of its potential for recurrence in every capital case involving multiple defendants. The ramifications of the decision of the Florida Supreme Court are ominous. The decision invites prosecutors throughout the State of Florida, and other states as well, to testify concerning their reasons for seeking the death penalty against a particular defendant. Allowing such testimony creates the grave risk that evidence which would otherwise be inadmissible, such as evidence illegally seized or confessions unlawfully extracted by police officers or state-appointed psychiatrists, is presented to the jury indirectly as the prosecutor's justifications for seeking the death penalty. Because of this great potential for abuse and because the Florida Supreme Court has failed to assure that the fundamental principles of procedural due process are abided by in capital presentence hearings, petitioner prays that this Court grant certiorari.

QUESTION II

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE AN ILLEGAL AGGRAVATING CIRCUMSTANCE CONTRIBUTED TO THE DECISION TO IMPOSE THE PENALTY OF DEATH.

The Supreme Court of Florida affirmed the death penalty imposed upon petitioner although the Court found that the trial court's imposition of the death penalty rested in part upon an improper aggravating circumstance. The Court improperly determined, however, that this error was harmless.

The decision of the Supreme Court of Florida directly conflicts with that of the Fifth Circuit Court of Appeals in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (No. 81-89). The Court there held that where the jury imposed the death penalty based upon three statutory aggravating circumstances, one of which was later held to be unconstitutional, the death penalty could not be upheld on appeal because "it is impossible for a reviewing court to determine satisfactorily that the verdict...was not decisively affected by an unconstitutional statutory aggravating circumstance." 631 F.2d at 406. Similarly here, it is impossible for the Supreme Court of Florida to determine that the imposition of the death penalty by the trial court was not decisively affected by consideration of an improper aggravating circumstance.

Section 921.141 requires the jury to determine whether sufficient aggravating circumstances exist to justify imposition of the death penalty, and if so, to determine whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances thereby justifying life imprisonment, rather than a sentence of death. Although the jury's recommendation is merely advisory, the Florida Supreme Court has held that a jury's recommendation of life may be overruled by the trial judge only when "the facts suggesting a sentence of

death...[are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908,910 (Fla. 1975). Because the jury is not required to enter specific findings of facts relating to the aggravating or mitigating circumstances found, a jury's recommendation of death merely indicates that the jury found sufficient aggravating circumstances to justify the death penalty and that the mitigating circumstances were insufficient to outweigh the aggravating circumstances.

The jury here was improperly instructed that it could consider as aggravating circumstances both the fact that the capital felony was committed for pecuniary gain and the fact that the capital felony was committed during a robbery. Because the Florida Supreme Court cannot determine that the jury's verdict was not decisively affected by consideration of an improper statutory aggravating circumstance, the death sentence should be set aside and the cause remanded for another sentencing hearing, as in Stephens v. Zant, supra. This is especially true here since the jury's penalty verdict was a general verdict, and, unlike the jury's verdict in Stephens v. Zant, supra, was uncertain in that the jury failed to make specific findings as to which aggravating circumstances were established beyond a reasonable doubt.

The Florida Supreme Court's affirmance here also violates the principle enunciated in Sandstrom v. Montana, 442 U.S. 510 (1979); Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Yates v. United States, 354 U.S. 298 (1957); and Stromberg v. California, 283 U.S. 359 (1931), that a criminal conviction must be reversed if the jury could have based its general verdict on an unconstitutional statutory ground, even though there were other valid statutory grounds which the jury in fact may have employed. Although the improper instruction here relates to sentencing, rather than the conviction itself, the

foregoing principle should be equally applicable since the capital sentencing procedure so closely resembles a trial. Cf. Bullington v. Missouri, __U.S.__, 68 L.Ed.2d 270, 101 S.Ct. 1852 (1981). Further, the erroneous instruction may well have deprived petitioner of a life recommendation by the jury, which could be overridden only under very limited circumstances. Tedder, supra.

It is clear that the trial court here improperly considered the fact that the capital felony was committed for pecuniary gain and the fact that the capital felony was committed during a robbery as two aggravating circumstances. Although death is presumed where there are aggravating circumstances counterbalanced by no mitigating circumstances, State v. Dixon, 283 So.2d 1,9 (Fla. 1973), the death penalty is not mandated in such a situation. See Demps v. State, 395 So.2d 501,505 (Fla. 1981),cert.denied,50 U.S.L.W. 3279 (U.S. Oct. 13, 1981). Since the Florida Supreme Court does not impose a sentence of death and does not reweigh or reevaluate the evidence adduced to establish aggravating or mitigating circumstances, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981),cert.denied,50 U.S.L.W. 3349 (U.S. Nov. 2, 1981), the Florida Supreme Court cannot, consistent with these principles, determine upon appellate review that the trial judge would have imposed the sentence of death absent his consideration of an improper aggravating circumstance. This assumption by the Supreme Court of Florida is particularly suspect where, as here, the trial judge's sentencing order merely negates the finding of any statutory mitigating circumstances. It is quite possible that the trial judge found, as allowed by Lockett v. Ohio, 438 U.S. 586 (1978), a non-statutory mitigating circumstance based upon the psychological testimony presented at the sentencing hearing that petitioner suffered a mild pattern of cerebral disfunctioning and was immature with poor impulse control which was

exacerbated by the use of intoxicants. Thus, the trial judge's weighing and balancing of the aggravating and mitigating circumstances may well have been different had he not considered the improper aggravating circumstance. To allow the Supreme Court of Florida to engage in the speculation that the trial judge's conclusion would have been no different absent his consideration of an improper aggravating circumstance significantly undermines the reliability of the sentencing determination and is incompatible with the Eighth and Fourteenth Amendments.

The issue of whether the sentencer's reliance upon improper aggravating circumstances in imposing a death sentence violates the Eighth and Fourteenth Amendments is a recurring one not only in Florida, but in other jurisdictions as well. E.g. Bufford v. State, 382 So.2d 1162 (Ala.Crim.App. 1980),cert.denied,382 So.2d 1175 (Ala. 1980); State v. Steelman, 612 P.2d 475 (Ariz. 1980),cert.denied,449 U.S. 913 (1980); Green v. State, 272 S.E.2d 475 (Ga. 1980), cert.denied, 450 U.S. 936 (1981); State v. Monroe, 397 So.2d 1258 (La. 1981); State v. Peery, 261 N.W.2d 95 (Neb. 1977), cert.denied, 439 U.S. 882 (1978); State v. Cherry, 257 S.E.2d 551 (N.C. 1979), cert.denied,446 U.S. 941 (1980); State v. Moore, 614 S.W.2d 348 (Tenn. 1981). Because the issue is a recurring one and because the decisions among the state and federal courts are conflicting, it is of utmost importance that this Court grant certiorari in order to determine the proper scope of appellate review in capital sentencing procedures where the sentencer has relied upon improper considerations in imposing a sentence of death.

QUESTION III

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE COURT FAILED TO DETERMINE WHETHER EX PARTE INFORMATION RELATING TO PETITIONER OR OTHER DEATH SENTENCE DEFENDANTS HAD BEEN RECEIVED AND REVIEWED BY THE COURT DURING ITS APPELLATE REVIEW PROCESS.

In his petitions for rehearing filed with the Florida Supreme Court, petitioner's counsel averred that he had observed in the Court's file a copy of a letter from the Court to the Department of Offender Rehabilitation requesting, ex parte, a copy of the latest psychological report pertaining to petitioner. Petitioner requested that the Court conduct a hearing to determine whether a psychological screening report pertaining to petitioner was received by the Court and whether such a report was read and considered by any members of the Court. (Appendix B-4-6; J-3-5). The Florida Supreme Court, sub silentio, denied petitioner's request apparently based upon its decision in Brown v. Wainwright, supra. Petitioner further asserted that receipt of such reports relating to other death-sentenced appellants would render Florida's capital sentencing procedure unconstitutional.

The Florida Supreme Court's ex parte consideration of non-record psychological reports relating to petitioner violates Gardner v. Florida, supra. There the Court invalidated a death sentence which had been imposed by the trial court based in part upon a confidential portion of a presentence report which had not been disclosed to the defendant or his counsel. The considerations applicable there - the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion", Id. at 358; the risk that undisclosed information may be erroneous or misinterpreted, Id. at 359; and the essential role of counsel and the adversary system to the process of evaluating facts upon which a sentencing decision may be based, Id. at 360 - apply with no less force to undisclosed factual information garnered by an appellate court.

Florida's appellate review system has previously been described as one which reposes in the Florida Supreme Court the "separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted", Songer v. State, 322 So.2d 481, 484 (Fla. 1975), vacated on other grounds, 430 U.S. 952 (1977), based upon the Court's reweighing of the evidence of the aggravating and mitigating circumstances, Proffitt v. Florida, 428 U.S. 242 (1976), and as one in which "a sentence of death cannot lawfully be carried out unless at least four members of [the Florida Supreme] Court agree that it is warranted, notwithstanding that the sentencing jury advised and the trial judge imposed that sentence." Vasil v. State, 374 So.2d 465, 471 (Fla. 1979). Brown v. Wainwright, supra, described the court's appellate function as two-fold: first, to determine that the death penalty was imposed with procedural regularity, and second, to compare the case under review with prior capital cases to ensure relative proportionality among death sentences which have been approved statewide. It is readily apparent that consideration of a non-record psychological report pertaining to petitioner by the Florida Supreme Court may affect both aspects of the court's appellate function. Thus, here, as in Gardner, affirmance of petitioner's death sentence based upon confidential information which was not disclosed to petitioner or his counsel violates the Due Process Clause of the Fourteenth Amendment.

Receipt by the Florida Supreme Court of non-record psychological reports infringed upon petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, a right applicable on appeal as well as at trial. See, Anders v. California, 386 U.S. 738 (1967). As noted in Gardner, "sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel." Id. at 358. Receipt of such non-record evaluative information on appeal, without notice to petitioner or his counsel, deprived counsel of the opportunity to deny, explain or place in context the information and rests upon the:

> erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.
>
> Id. at 360

By depriving petitioner's counsel this opportunity to comment on undisclosed facts related to petitioner, the Florida Supreme Court has impeded the effectiveness of petitioner's appellate counsel.

The Florida Supreme Court's consideration of non-record psychological reports additionally deprived petitioner of his Fifth Amendment privilege against self-incrimination, his Sixth Amendment right to confrontation and to counsel and his Eighth Amendment right to accurate and reliable sentencing information in the determination that death is the appropriate punishment. "A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the 'character and record of the individual offender,' [Woodson v. North Carolina; supra at 304], fails to meet the 'need for reliability in the determination that death is the appropriate punishment' which the Court indicated was required in Woodson, supra, at 305" Gardner, supra at 364 (White, J., concurring in judgment). Untested by the adversary process, "[t]he risk that some of the information...may be erroneous, or may be misinterpreted,...is manifest." Gardner, at 359. Since the psychological report may well consist of inadmissible, unreliable hearsay, consideration of the report without the opportunity of cross-examination deprived petitioner of his confrontation rights. See Ohio v. Roberts, supra. Consideration of a psychological report pertaining to petitioner may also contravene this Court's decision in Estelle v. Smith, ___U.S.___ (68 L.Ed.2d 359) (1981).

Receipt by the Court of such reports pertaining to other death-sentenced appellants violates petitioner's Eighth

Amendment protection against the arbitrary and capricious infliction of the death penalty. In upholding the facial validity of Florida's death penalty statute, this Court indicated that appellate review by the Florida Supreme Court would assure consistency, fairness, and rationality in the operation of the statute since the Court reviews each death sentence to ensure that similar results are reached in similar cases. Proffitt v. Florida, supra. This proportionality review is rendered meaningless and the appellate process skewed if the sentences of other capital defendants with which petitioner's sentence was compared are upheld or vacated on the basis of undisclosed factual information.

This Court should grant certiorari to determine whether the Florida Supreme Court's receipt and consideration of non-record evaluative materials relating to petitioner or other death-sentenced appellants is consistent with the constitutional requirements discussed above.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari to The Supreme Court of Florida has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D. C. 20543; Mr. Charles Dwight Messer, #025822, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee,Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 23 day of December, 1981.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER